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In the Supreme Court of the United States

NEIL RANDALL, *ET AL.*, PETITIONERS,

V.

WILLIAM H. SORRELL, *ET AL.*, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR HEIDI BEHRENS-BENEDICT, JANICE BOWLING, AND DON HOOPER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Unlimited Campaign Spending Discourages Ordinary Citizens from Running for Elected Office, Particularly Against Incumbents. 4

A. The Empirical Data. 4

B. The Amici Candidates' Experiences. 8

II. Unlimited Campaign Spending Engenders Public Perception that Access to Elected Officials Is for Sale. 11

III. Campaign-Spending Limits Would Directly Address The Threats to Electoral Competition and Public Trust. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Briefs in the Record

Brief of Senator Mitch McConnell as Amicus Curiae — passim

Brief of the Republican National Committee as Amicus Curiae — passim

Other Authorities

Joseph E. Cantor, *Campaign Finance*, Congressional Research Service (Nov. 3, 2005), *available at* http://wwwc.house.gov/case/crs_reports/campaign.finance.pdf — 6, 11

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Center for Responsive Politics, *The Big Picture: Incumbent Advantage*, http://www.opensecrets.org/bigpicture/incumbs.asp?cycle=2002 — 6

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TABLE OF AUTHORITIES CONT'D

Page

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TABLE OF AUTHORITIES CONT'D

Page

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U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform* (2006), *available at* http://www.pirg.org/democracy/reports/raisingthelimits.pdf 6, 7, 11

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR HEIDI BEHRENS-BENEDICT, JANICE BOWLING AND DON HOOPER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS[1]

INTEREST OF THE AMICI CURIAE

With the attached or previously filed written consent of all parties, Heidi Behrens-Benedict, Janice Bowling, and Don Hooper (collectively, the "Amici Candidates") submit this brief in support of the 1997 Vermont Campaign Finance Reform Act ("Act 64"), which expressly limits expenditures in campaigns for public office. Each Amici Candidate campaigned for the United States House of Representatives in 2004, and two of the Amici Candidates campaigned for the same office in prior elections. In particular:

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[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

- *Amicus* Heidi Behrens-Benedict, a Democrat from the 8th District of Washington, ran unsuccessfully for the U.S. House of Representatives in 1998, 2000, 2002, and 2004. In 1998, 2000, and 2002, Ms. Behrens-Benedict challenged a Republican incumbent. In 2004, Ms. Behrens-Benedict ran for an open seat but was defeated in the Democratic primary.

- *Amicus* Janice Bowling, a Republican from the 4th District of Tennessee, ran unsuccessfully for the U.S. House of Representatives in 2002 and 2004. Ms. Bowling ran for an open seat in 2002 and ran against a Democratic incumbent in 2004.

- *Amicus* Don Hooper, a Republican from the 1st District of Michigan, ran for the U.S. House of Representatives in 2002 and 2004. Mr. Hooper challenged unsuccessfully the Democratic incumbent in the general election.

Each Amici Candidate experienced firsthand the effects of unfettered campaign expenditures on their campaigns and the electoral process. Through extensive engagement with voters, the Amici Candidates also observed the impact of unlimited campaign spending on the public's faith in representative democracy. The Amici Candidates thus provide valuable perspective on the impact of our current system of unbridled expenditures on the ability and willingness of ordinary individuals to run for public office, the protection of incumbency, and the public's perception of the electoral process. The Amici Candidates respectfully submit that the competitiveness of, and public trust in, representative democracy are compelling governmental interests, and that campaign spending limits would be an effective and targeted means to achieve these critical ends.

SUMMARY OF ARGUMENT

The current system of unlimited campaign spending has produced skyrocketing campaign costs and vast spending disparities between winners and losers, and incumbents and challengers, in electoral races. This state of affairs has eroded electoral competition by rendering campaigns by ordinary citizens prohibitively expensive, if not competitively impossible. Unlimited spending has served as an incredibly effective incumbency-protection system. Incumbents – with the help of political action committees ("PACs") – consistently and thoroughly out-raise and outspend challengers, especially in the House of Representatives, leading to victories more than 95 percent of the time in the last decade. *See* Center for Responsive Politics, *Reelection Rates Over the Years*, http://www.opensecrets.org/bigpicture/reelect.asp?cycle=2002 (last visited Feb. 6, 2006). Further, large incumbent war chests discourage challengers in the first place.

The correlations between money, electoral success, special interests and incumbency are not lost on average citizens. In strategy meetings, at debates and fundraising events, and in one-on-one conversations with voters, the Amici Candidates witnessed how the current system has cultivated a culture of cynicism, not only about the ordinary person's ability to participate in government through election to public office, but also about our government's ability fairly and effectively to vindicate the interests of ordinary people.

The Amici Candidates can think of few governmental interests more compelling than vigorous participation and public faith in representative democracy. The Amici

Candidates also submit that campaign-spending limits would directly target the threats currently posed to these interests. Therefore, they urge this Court to affirm the Second Circuit's ruling that campaign-spending limits like those in Act 64 can be narrowly tailored to serve compelling governmental interests.

ARGUMENT

I. Unlimited Campaign Spending Discourages Ordinary Citizens from Running for Elected Office, Particularly Against Incumbents.

The Amici Candidates submit that the current system of unlimited campaign expenditures has created an environment in which the single best predictor of electoral success is a candidate's ability to raise and spend money. This state of affairs discourages qualified but ordinary non-wealthy citizens from challenging opponents with superior access to campaign funds – particularly incumbents, who benefit from inherent fundraising advantages. In the process, electoral competition is diminished and incumbency is promoted. These propositions find ample support in both the available empirical data and the Amici Candidates' own experiences.

A. The Empirical Data.

The relationship between money, victory and incumbency is well illustrated by the available data on the ever-rising costs of campaigning for federal office, the massive spending disparities between winning and losing candidates, and the demonstrated ability of incumbents as a class to out-fundraise challengers.

The Upward Spiral. The overall cost of campaigns has skyrocketed in the last decade. According to the Federal

Election Commission ("FEC"), Congressional candidates spent $1.16 billion on campaigns during the 2003-2004 election cycle, up from approximately $440 million in the 1989-1990 cycle. *See* News Release, Federal Election Commission, Congressional Candidates Spend $1.16 Billion During 2003-2004 (June 9, 2005), *available at* http://www.fec.gov/press/press2005/20050609candidate/20050609candidate.html. Winning House candidates spent a total of $494 million in the 2004 elections, compared with $297 million in 1996. *See id.* This trend shows no sign of slowing; as of the end of the third quarter of 2004, House candidates reported raising $202.4 million, 23 percent more than candidates had raised through the same period in 2003. *See* News Release, Federal Election Commission, House Candidate Fundraising Increases (Oct. 19, 2005), *available at* http://www.fec.gov/press/press2005/20051019candidate/20051019house.html.

The Price of Victory. As overall fundraising and campaign spending have increased, so has the spending gap between winners and losers. According to an analysis of campaign finance data conducted by the U.S. Public Interest Research Group ("U.S. PIRG"), candidates for the House of Representatives and the Senate who outspent their opponents won over 93 percent of general election races in the 2002 election cycle. *See* U.S. PIRG Education Fund, *Look Who's Not Coming to Washington,* at 4 (2003), *available at* http://www.uspirg.org/reports/lookwhosnot1_03.pdf. According to the Center for Responsive Politics, in more than two-thirds of Congressional districts, the winner outspent the second-highest vote-getter by a factor of at least ten to one; in more than 91 percent of districts, the winner spent at least double the amount spent by the runner-up. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2002 Cycle,* http://www.opensecrets.org/

bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 6, 2006). The average winning candidate raised $1,308,270, while the average losing candidate raised only $330,852 – a disparity of 4-to-1. *See* U.S. PIRG Education Fund, *The Role of Money in the 2002 Congressional Elections*, at 14 (2003), *available at* http://www.uspirg.org/reports/roleofmoney2003.pdf.

The Incumbency Advantage. Available data illustrates a similarly pronounced fundraising disparity between incumbents and challengers. In the 2002 election cycle for the House of Representatives, the average incumbent raised $898,382, compared with $197,608 for the average challenger, a margin of 4.5-to-1. All but two percent of House incumbents were reelected. *See* Center for Responsive Politics, *The Big Picture: Incumbent Advantage*, http://www.opensecrets.org/bigpicture/incumbs.asp?cycle=2002 (last visited Feb. 6, 2006).

The trend was similar in the 2004 congressional elections. House incumbents spent an average of $1 million, compared with average expenditures of $269,000 by challengers, a margin of 3.7-to-1. *See* Joseph E. Cantor, *Campaign Finance*, Congressional Research Service, at 4 (Nov. 3, 2005), *available at* http://wwwc.house.gov/case/crs_reports/campaign.finance.pdf. Again, all but two percent of House incumbents were reelected. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform*, at 4 (2006), *available at* http://www.pirg.org/democracy/reports/raisingthelimits.pdf.

If anything, the fundraising advantages of incumbency should be expected to increase. As candidates confront the prospect of financing ever-more-expensive campaigns despite dollar limits on individual contributions, PACs and "bundlers" of large individual contributions play an

increasingly central role in the money chase. Spending by PACs increased by more than 28 percent between the 2001-2002 election cycle and the 2003-2004 election cycle. *See* News Release, Federal Election Commission, PAC Activity Increases for 2004 Elections (Apr. 13, 2005), *available at* http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html. Incumbents are the chief beneficiaries of PAC largess. In 2004, incumbents received 79 percent of the PAC contributions; challengers received only 7 percent. *See id.* Among business-industry PACs, 83 percent of spending went to incumbents, while only 4 percent went to challengers. *See* Center for Responsive Politics, *The Big Picture: PAC Dollars to Incumbent, Challenger, and Open Seat Candidates,* http://www.opensecrets.org/bigpicture/pac2cands.asp?cycle=2002 (last visited Feb. 6, 2006).

The recent doubling of federal hard money contribution limits also seems likely to cement incumbency advantages. Incumbents continue to raise both a greater percentage of their individual funds in contributions of at least $1,000 and much more money in these large gifts overall. In 2004, for example, incumbents out-raised challengers by $178 million in individual contributions of at least $1,000, and the reelection rates in both Houses increased. These increased limits, therefore, seem to have augmented, rather than alleviated, the fundraising gap between incumbents and challengers. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform,* at 8-9 (2006), *available at* http://pirg.org/democracy/reports/raisingthelimits.pdf. The incumbency advantage stands to reason. Moneyed interests view incumbents, who hold established positions in the party and committee hierarchies and benefit from significant barriers to challenger entry, as "sound investment[s]." Center for Responsive Politics, *The Big Picture: PAC Dollars to Incumbent, Challenger, and*

Open Seat Candidates, http://www.opensecrets.org/bigpicture/pac2cands.asp?cycle=2002 (last visited Feb. 6, 2006).

B. The Amici Candidates' Experiences.

The experiences of the Amici Candidates are consistent with the above data. They also illustrate the barriers that the current system has placed in the way of ordinary citizens of modest means who are interested in challenging incumbents for public office.

Amicus Behrens-Benedict. Amicus Behrens-Benedict ran for the House of Representatives four times from 1998 through 2004. Absent her participation in the first three of these races, the incumbent would have run unopposed with an average war chest of over one-and-a-half million dollars. In 1998, faced with this massive disparity in funds, the national party tried to dissuade Amicus Behrens-Benedict from running and did not provide her with any support. Because Amicus Behrens-Benedict was not wealthy, her national party suggested she mortgage her home to help finance campaign costs – a suggestion she did not take.

In the 2000 election, Amicus Behrens-Benedict raised $371,381, while her incumbent opponent and the ultimate winner, Jennifer Dunn, raised more than $1.7 million. Dunn received 14 times more money from PACs than did Amicus Behrens-Benedict. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2000&id=WA08 (last visited Feb. 6, 2006). In 2002, the disparity was even more dramatic: Dunn, who again won the election, raised $1.8 million compared with $133,307 raised by Amicus Behrens-Benedict. Dunn received 71 times more money from PACs. *See* Center for Responsive Politics,

Congressional Races: Total Raised and Spent, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=WA08 (last visited Feb. 6, 2006). Amicus Behrens-Benedict also observed that even PACs with which her stance on issues was aligned were hesitant to provide her with donations because her race was viewed as futile.

Amicus Bowling. Amicus Bowling, a former district director for a Congressman and mother of three, is not independently wealthy. When Amicus Bowling first ran for an open House seat in 2002, her party encouraged her to take out a personal loan to finance her campaign. Instead, she managed to raise $572,625, and two-thirds of that was from individual donors making relatively small contributions. Her opponent, Lincoln Davis outspent her by a factor of 2.3 to 1, contributing $226,500 of his own funds and raising nearly 3 times more from PACs than Amicus Bowling. Davis won by a margin of 52 to 47. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=TN04 (last visited Feb. 6, 2006).

In 2004, Amicus Bowling again challenged Lincoln Davis, who was then an incumbent. Again she was asked to take out a personal loan, but she did not. In this campaign, Representative Davis outspent Amicus Bowling by a factor of 3. Davis, the incumbent, did not need to contribute any of his personal funds, while Amicus Bowing's overall fundraising was cut in half compared to 2002. Most significantly, she received only $9,500 from PACs, a mere 5 percent of the PAC support she received in her race for the open seat in 2002. Davis, on the other hand, received $680,362 from PACs – nearly 60 percent of his total campaign funds. As a challenger without access to PACs or major out-of-state donors, Amicus Bowling relied on

individual contributions from voters in her district for 92 percent of her funds. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2004&id=TN04 (last visited Feb. 6, 2006). Like Amicus Behrens-Benedict, Amicus Bowling did not receive financial support from certain PACs even though she stood strongly for their issues because, as a challenger, she was not viewed as a worthwhile "investment."

Davis' campaign was conducted primarily through television advertising in all the media markets in the district, while Amicus Bowling was not able to compete with his extensive outlays of funds for television airtime. In fact, she was forced to forgo television advertising in two major media markets in the district. Amicus Bowling also was unable to send as much direct mail as Davis, or counter Davis' use of telemarketing firms to conduct "push poll" campaigns. In 2004, Davis won by a margin of 55 to 44 percent. *See id.*

Amicus Hooper. Amicus Hooper, a retired businessman, mortgaged his home and incurred nearly $20,000 of debt in his campaigns for Congress in 2002 and 2004. Because he could not afford to saturate the media market in his large district with advertising, Amicus Hooper conducted his campaign by traveling around his district to meet with voters, sleeping in his personal camper and using his limited funds to pay for gas. In 2002, the incumbent candidate and ultimate winner, Bart Stupak, outspent Amicus Hooper by a factor of 55 to one; in 2004, the ratio increased to 77 to one. While Amicus Hooper received no PAC money in either election, Stupak received 71 percent of his funding from PACs in 2002, and more than half from PACs in 2004. *See* Center for Responsive Politics, *Congressional*

Races: Total Raised and Spent, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=MI01 (last visited Feb. 6, 2006); Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2004&id=MI01 (last visited Feb. 6, 2006).

These experiences have left the Amici Candidates convinced that it is virtually impossible for an average citizen without personal wealth or access to PACs or networks of wealthy donors to raise the funds necessary to mount a successful Congressional campaign against a well-funded opponent. The financial advantages of incumbency make the prospects for successfully challenging a sitting Congressperson even grimmer.

II. Unlimited Campaign Spending Engenders Public Perception that Access to Elected Officials Is for Sale.

Collectively, the Amici Candidates have spent several months traveling around their districts and interacting with voters in multiple election cycles. Their anecdotal experiences confirm that most Americans believe corruption is endemic to a political system that, at its core, is driven by an insatiable desire for ever-larger campaign war chests. According to recent polls, public confidence in Congress is at its lowest rate in eight years, and corruption in government shares the top spot with terrorism for public concern. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform*, at 6 (2006), *available at* http://pirg.org/democracy/reports/raisingthelimits.pdf. The vast sums of money contributed to and expended in political campaigns leave an indelible impression that elected offices can be "bought and sold." *See* Joseph E. Cantor, *Campaign*

Finance, Congressional Research Service, Summary (Nov. 3, 2005), *available at* http://wwwc.house.gov/case/crs_reports/campaign.finance.pdf.

Moreover, the ability of special interests and large corporations to deliver the funds necessary to conduct an effective campaign creates the perception that elected officials elevate these interests' concerns over those of ordinary voters. *See id.* Because money helps win elections, candidates for office understandably focus their campaign efforts on the largest potential donors. In effect, special interests make an investment in, not a contribution to, a candidate's campaign. The public understandably perceives an insidious *quid pro quo* relationship between elected officials and the moneyed interests who made their election possible.

In the course of conducting their campaigns, the Amici Candidates encountered a pervasive perception among voters that the current system of unlimited campaign expenditures has corrupted the fair and effective functioning of government. Many voters believe that it is futile to raise concerns with elected officials because large donors have effectively monopolized political access. The Amici Candidates observed a widespread view that elected officials and candidates are beholden to large donors at the expense of ordinary citizens.

III. Campaign-Spending Limits Would Directly Address The Threats to Electoral Competition and Public Trust.

Based on their experiences, the Amici Candidates believe that campaign-spending limits, such as those embodied in Act 64, would be a focused and effective method of

promoting and enhancing the competitiveness of the electoral process. Under the current system, average citizens effectively are excluded from elected office because they simply cannot raise the money needed to compete in an election, particularly against an incumbent. Leveling the financial playing field would increase electoral competition from challengers, who currently face fundamental and systemic barriers to entry and fair competition.

Further, based on their interactions with voters, the Amici Candidates submit that ending the campaign-finance wars would go a long way toward restoring public confidence in the fairness of government and the responsiveness of elected officials. In fact, the Amici Candidates believe that the majority of voters they interacted with would support campaign-spending limits. This belief is consistent with a recent poll finding that 87 percent of voters think such limits would improve the fairness, honesty and integrity of the electoral process. *See* Press Release, Demos, National Survey Shows That Americans Want Campaign Finance Reform (Jan. 5, 2006), *available at* http://www.demos-usa.org/page423.cfm.

Finally, the Amici Candidates submit that campaign-spending limits would promote these interests without further entrenching incumbents. Other amici in this case have argued that limiting spending would systematically advantage incumbents by preventing challengers from raising enough money to effectively combat incumbents' existing advantages. *See, e.g.*, Brief of Senator Mitch McConnell as Amicus Curiae, at 18-22; Brief of the Republican National Committee as Amicus Curiae, at 22-23. The Amici Candidates believe that this argument is flawed in three critical ways. First, the argument assumes that challengers will regularly be able to out-raise incumbents

when in reality this situation is extremely rare. It also fails to address the massive disparities in PAC funding for incumbents, as Amici Bowling's different experiences in 2002 and 2004 vividly illustrate. Second, the argument ignores the effect of large incumbent war chests on discouraging qualified challengers from entering races in the first place, a hurdle illustrated by Amicus Behrens-Benedict's and Amici Hooper's experiences. Finally, the argument contradicts the experiences of successful challengers. Each of the four challenger candidates that defeated House incumbents in 2002 closed the gap in spending, suggesting that a level playing field, rather than complete outspending, can give a challenger a fair chance. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2002 Cycle*, http://www.opensecrets.org/bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 6, 2006) (races for the following districts: 8th District of Maryland, 2nd of Minnesota, 1st of New York, and 5th of Florida).

Fundamentally, the argument that campaign spending limits will further the entrenchment of incumbents ignores that incumbents currently enjoy *all* advantages of incumbency. Eliminating the significant fundraising advantage would at least eliminate one advantage of incumbency. It would not create any incumbency benefits that do not already exist. The Amici Candidates strongly believe that campaign spending limits will help our democracy revive by facilitating representation based on the consent of the governed, not the consequences of the dollar.

CONCLUSION

For the foregoing reasons, the Amici Candidates urge the Court to affirm the Second Circuit's ruling that campaign-spending laws, such as those in Act 64, can be narrowly tailored to serve compelling governmental interests.

Respectfully submitted,

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